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Supreme Court, U.S.
FILED
JUN 15 2001
OFFICE OF THE CLERK

CAPTIAL CASE – NO DATE OF EXECUTION SET
No. 00-1742

IN THE

Supreme Court of the United States

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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June 14, 2001

Balmar Legal Publishing Services, Washington, DC 202-682-9800

6 pp

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1. In *Penry* v. *Johnson*, No. 00-6677 (June 4, 2001) (*Penry II*), this Court held that the instructions given to the jury at the defendant's resentencing hearing (at which he was again sentenced to death) were constitutionally inadequate – despite the use of a supplemental instruction regarding mitigating evidence – because the jury was unable "to make a reasoned moral response to Penry's mitigating evidence." *Id.*, slip op. at 16. The Court's holding in *Penry II* is not directly implicated here, but it is based on a principle of substantial relevance to this case: the importance in the capital sentencing process of the jurors' sense of a defendant's moral culpability. Specifically, the Court emphasized in *Penry II* that "it is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision that we can be sure that the jury has treated the defendant as a uniquely individual human bein[g] and has made a reliable determination that death is the appropriate sentence." *Id.*, slip op. at 13 (alteration in original; citations and internal quotation marks omitted).

The principle that the sentencer's sense of a defendant's moral culpability is an essential element in determining whether to impose the death penalty has been consistently reflected in this Court's precedents. In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), this Court explained that

> punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

Id. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). The Court's holding in *Penry I* relied on earlier cases such as *Lockett* v. *Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982). In *Lockett*, the Court found Ohio's death penalty statute to be unconstitutional when it limited consideration of mitigating evidence to three statutory factors. 438 U.S. at 604-05. The *Lockett* plurality explained that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. In *Eddings*, the Court invalidated the defendant's death sentence on the ground that the sentencing judge had failed to consider mitigating evidence regarding the defendant's troubled family history and emotional disorders. The Court emphasized that although the sentencer "may determine the weight to be given relevant mitigating evidence," it "may not give it no weight by excluding such evidence from [its] consideration." 455 U.S. at 114-15.

In cases since *Penry I*, this Court has repeatedly reiterated its holding that punishment should be related to a defendant's moral culpability, such that the sentencer must be allowed to consider and give effect to relevant mitigating evidence. See, *e.g.*, *McKoy* v. *North Carolina*, 494 U.S. 433, 443 (1990); *Boyde* v. *California*, 494 U.S. 370, 381-82 (1990); *Saffle* v. *Parks*, 494 U.S. 484, 492-93 (1990). As discussed at length in the Petition for Certiorari, see Pet. for Cert. 17-18, this Court squarely addressed this issue last Term in *Williams* v. *Taylor*, 529 U.S. 362 (2000), in which it reversed the Virginia Supreme Court's finding that petitioner had not been prejudiced by the ineffective assistance of his counsel. 529 U.S. at 398. The Court explained in *Williams* that although the mitigating evidence presented by the defendant's trial counsel regarding the defendant's remorse and cooperation with law enforcement officials may not have

overcome a finding of aggravating circumstances regarding future dangerousness, "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability. * * * Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 398 (citing *Boyde* v. *California*, 494 U.S. 370, 387 (1990)).

2. In this case, in reaching its conclusion that petitioner was prejudiced by his counsel's failure to present any mitigating evidence, the district court made clear that it relied on the standard set forth by this Court in *Penry I*.[1] Notwithstanding the district court's accurate and explicit identification of this standard, the Sixth Circuit nonetheless failed to acknowledge – much less follow – *Penry I* and its progeny. Instead, the Sixth Circuit considered only the "balance" between mitigating and aggravating factors,

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[1] The district court noted:

> Mitigating evidence relevant to the selection decision includes "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2946, 106 L.Ed.2d 256 (1989). As the Supreme Court has explained: "If a sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" 109 S.Ct. at 2947 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)). The sentencing decision should reflect "a reasoned moral response to the defendant's background, character, and crime." *Id.*

Pet. App. 87a.

concluding that "because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death." Pet. Supp. 20a.

The court of appeals' narrow focus on the "balance" of aggravating and mitigating factors is inconsistent with this Court's precedents and completely ignores how jurors would have treated the evidence – that is, in determining whether to impose the death penalty, jurors would not simply have balanced aggravating and mitigating factors, but rather would have considered the mitigating evidence as it bore on petitioner's moral culpability. As this Court noted in *Penry I*, confirmed in *Williams* v. *Taylor*, and most recently reaffirmed in *Penry II* after the filing of the petition for certiorari in this case, mitigating evidence regarding a defendant's background and character may influence the jury's assessment of that defendant's moral culpability, *Penry I*, 492 U.S. at 319; *Williams*, 529 U.S. at 398, and "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," *Williams*, 529 U.S. at 398. The Sixth Circuit's failure to follow the standard outlined by this Court in *Penry I* was particularly egregious insofar as it disregarded entirely large amounts of mitigating evidence found by the district court – for example, evidence regarding the horrific physical and emotional abuse suffered by petitioner as a child, petitioner's own mental illness as well as his dysfunctional family history arising from mental illness, and petitioner's good character and contributions to society.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition, certiorari should be granted.

Respectfully submitted,

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